PATTERNS OF POWER · ENGLISHMEN OUT OF ENGLAND

AS IF THEY HAD BEEN ABIDING AND BORN

A companion study · Englishmen out of England · 1606 — 1765 — 1776

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held as tested, not revealed

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A case study in the Patterns of Power series.
Primary sources quoted exactly; modern scholarship paraphrased and credited.
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COMPANION STUDY

As If They Had Been Abiding and Born

Englishmen out of England, 1606–1776 — a charter clause, a 1608 case on allegiance, a division of 204 to 188 in which the British landed gentry voted itself a tax cut, and a Declaration of Independence whose operative verb is the word the Convention chose in 1689 because it had no meaning in the common law

The premise, and the clause it rests on

The men who made the American Revolution were not Americans. There were no Americans. They were Englishmen living outside England, who understood themselves to hold every right of an Englishman walking in Cheapside, and who said so continuously for eleven years in language drawn entirely from English statutes, English charters and English case law.

That is not a rhetorical framing and it is not generous. It is what the founding instruments say, and it is the reason the quarrel took the shape it did — a legal argument, conducted in the technical vocabulary of the common law, by men who expected to win it on the merits, and who were correct that they had the better case and wrong about what a better case is worth.

The clause is in the First Charter of Virginia, granted by James I on 10 April 1606:

> *Alsoe wee doe, for us, our heires and successors, declare by theise presentes that all and everie the parsons being our subjects which shall dwell and inhabit within everie or anie of the saide severall Colonies and plantacions and everie of theire children which shall happen to be borne within the limitts and precincts of the said severall Colonies and plantacions shall have and enjoy all liberties, franchises and immunities within anie of our other dominions to all intents and purposes as if they had been abiding and borne within this our realme of Englande or anie other of our saide dominions.*

Read what it does. It is not a promise of good treatment. It is a **declaration of status**, expressed in the standard conveyancing formula of the age — *to all intents and purposes as if* — which is the language a lawyer uses to make two things legally identical. And it covers the children born there, which makes the status heritable, which is what turns a privilege into a right.

Similar clauses went into the charters of Massachusetts Bay, Maryland, Carolina, Pennsylvania and Georgia. They were not decorative. For a hundred and seventy years they were the operative legal foundation of every colonial claim against every royal governor, and when the argument came to its crisis the colonists quoted them by name.

Consider the second of the Virginia Resolves, passed at Williamsburg on 30 May 1765, in Patrick Henry's own manuscript:

> *Resolved, That by the two royal Charters granted by King James the first the Colonists aforesaid are declared intituled to all the Priviledges, Liberties & Immunities of Denizens and natural born Subjects to all Intents and Purposes as if they had been abiding and born within the Realm of England.*

That is not a paraphrase of 1606. It is a citation. A colonial assembly answering a British revenue statute by pleading a hundred-and-fifty-nine-year-old charter clause, word for word, as a party pleads a deed.

Everything that follows is the working-out of what that clause meant, by men who thought it meant what it said.

Calvin's Case, and an empire made of allegiance

The legal architecture underneath the charters is a single decision of 1608 and it deserves to be set out properly, because it is doing more work in this story than any statute.

Robert Calvin was an infant born in Scotland after James VI became James I of England. The question was whether the *postnati* — Scots born after the union of the crowns — were aliens in England, and therefore incapable of holding English land. The Exchequer Chamber, with the Lord Chancellor and fourteen judges, held they were not. Coke's report is the classic statement of the common law of allegiance, and it turns on a proposition of reciprocity:

> *it is truly said that protectio trahit subjectionem, et subjectio protectionem*

Protection draws subjection, and subjection protection. Allegiance is owed to the **king in person**, not to the kingdom, not to the soil, and not to Parliament. It is created by birth within the king's protection and it is answered by the king's duty to protect.

Two enormous consequences follow, and the whole imperial constitution sat on them for a century and a half.

First, the colonies belong to the king and not to the realm of England. A Virginian owed allegiance to George III as a subject of the crown, exactly as a

Yorkshireman did. What he did not obviously owe was subordination to the Parliament of England, which was the assembly of a different dominion. That is the *dominion theory*, and when Jefferson, James Wilson and John Adams reached it independently in 1774 and 1775 they were not inventing a doctrine but reading Coke.

Second, and this is the clause that ends the story: allegiance is conditional on protection. Not as a matter of political theory but as a matter of the common law of England, stated by the greatest of its expositors, in the leading case, at the beginning of the seventeenth century.

Hold that. It will be the hinge of the Declaration of Independence.

To it, Calvin's Case added the distinction — repeated by Blackstone and universally accepted — between countries acquired by **conquest**, where the conqueror may impose what law he likes, and countries **settled** by subjects in uninhabited or newly discovered territory, where the settlers carry English law with them as a birthright. Which of the two America was is a question the colonists never doubted and the ministry never conceded, and it is the fault line under everything.

What the Seven Years' War cost, and who declined to pay it

The empire that emerged from the Peace of Paris in 1763 was the largest in the world and it was broke.

The war roughly doubled the British national debt, and the service of it consumed a very large share of ordinary revenue — the standard figures put the debt at something over £130 million by 1763 against something like £75 million before the war. The question of who should pay for the peacetime establishment in America, ten thousand or so regulars strung along a new frontier, was a real question and the ministry's frustration was not manufactured. The colonies had contributed to the war and had been substantially reimbursed for it; they were, by any measure, lightly taxed by comparison with Britain.

And then, on 16 January 1767, something happened in the House of Commons that the American accounts pass over almost entirely and that this study regards as the most important single event in the sequence.

Charles Townshend brought in his budget. It contained, as every budget had since 1692, a land tax of four shillings in the pound. Grenville and Dowdeswell combined against the ministry and moved to reduce it to three. **The motion carried, 204 to 188.** By long-standing precedent a ministry defeated on a money bill resigned; this one did not. Townshend set to work to find the missing half-million, and shortly afterwards brought forward his measures for America.

The Townshend duties — on glass, lead, paint, paper and tea — were expected to yield about £40,000 a year.

Set those numbers beside each other and do not soften the result. **The British landed interest voted itself a tax cut worth roughly half a million pounds, and the ministry went looking for the money among people who had no vote, and found forty thousand.**

The companion study of the Revolution of 1688 found that the variable separating England's fiscal-military success from Poland's extinction was whether the constraining class taxed itself: the English gentry voted four shillings in the pound on its own estates and paid it, and that willingness was the foundation of everything the eighteenth-century British state achieved. This division is where the willingness stopped. And the sequel is the general rule, which the collection should carry:

Where a hierarchy that has been taxing itself stops, it will look for a population without a vote to tax instead — and the search is what turns a fiscal problem into a constitutional crisis. The amount recovered is usually trivial, as it was here, because the point was never the money; the point was that a class with representation had declined to pay and a class without it could not decline.

The boundary, and a proclamation against a charter

The other half of what 1763 did was territorial, and it is the part that reaches the pockets of the men who would lead the resistance.

The Royal Proclamation of 7 October 1763 reserved the land west of the Appalachian watershed to the Indians and forbade both settlement and private purchase there, reserving the whole to the crown.

That was defensible policy. Pontiac's war was in progress; the frontier was expensive; the crown had treaty obligations and no money.

But look at it as a legal act, because the colonists did.

The Virginia charter of 1609 granted the colony's bounds westward and north-westward **from sea to sea**. Connecticut and Massachusetts held comparable sea-to-sea language. Those were grants under the great seal. The Proclamation was an executive act under the prerogative. And the effect of the second was to cut down the first.

This is the identical operation the Dominion of New England had run in Massachusetts in 1687, and it is the identical doctrine: **all title descends from the crown, and what the crown has granted the crown may reach.** A Virginian who had a patent for Ohio land, or a veteran holding a bounty warrant from the 1754 proclamation, or a subscriber to the Ohio Company or the Loyal Company, discovered

that the source of his title had been redefined by a document he had no part in and no court in which to challenge.

The men affected were not marginal. They were the Virginia gentry, and they included George Washington, whose western claims and whose surveying interests were substantial and who regarded the Proclamation, in private, as a temporary expedient to quiet the Indians.

The Quebec Act of 1774 completed it, extending the province of Quebec south and west to the Ohio and placing the whole interior under a government with no assembly and French civil law. The Declaration of Independence names it, in terms that make its legal character plain: *abolishing the free System of English Laws in a neighbouring Province, establishing therein an Arbitrary government, and enlarging its Boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies.*

Two grievances therefore run in parallel from 1763 and they are the same grievance in two registers. Taxation without consent is an attack on the subject's property in his purse. The redrawing of charter boundaries by prerogative is an attack on his property in his land. The second was worth far more money to the men who led the resistance, and it is almost absent from the story their descendants tell.

Henry's resolves, and why they were not radical

Patrick Henry's resolutions of May 1765 have come down as the incendiary opening of the Revolution — offered by a twenty-nine-year-old to a thin House, in the absence of the conservative leadership, and answered, on the traditional account, by cries of "Treason!"

Read as law, they are among the most conservative documents of the period.

The **first** resolve claims that the first adventurers and settlers *brought with them and transmitted to their Posterity … all the Priviledges, Franchises & Immunities that have at any Time been held, enjoyed, & possessed by the People of Great Britain.* That is the settlement limb of Calvin's Case: settlers carry English law with them, and the rights are heritable.

The **second** cites the two royal charters of James I verbatim, as set out above. That is a plea on a deed.

The **third** asserts that taxation by the people themselves or by representatives of their choosing is *the distinguishing Characteristick of British Freedom, without which the ancient Constitution cannot exist*. The **ancient constitution** is Coke's phrase and Coke's doctrine, and it was the standard vocabulary of English constitutional argument for a century and a half.

The **fourth** is the one that matters most and is least noticed. It asserts that the colony has uninterruptedly enjoyed the right of being governed by its own assembly in the article of taxes and internal police, *and that the same has never been forfeited or yielded up, but has been constantly recognized by the kings and people of Great Britain.*

That is **prescription** — title by long, uninterrupted, acknowledged usage — which is one of the oldest and most respectable grounds of right known to the common law, the ground on which a hundred manorial customs and a thousand rights of way rested. Henry is not appealing to nature. He is pleading that Virginia has enjoyed a right for a hundred and fifty years without interruption and with the crown's acknowledgment, and that a right so enjoyed cannot be taken away.

Only the fifth resolve — that the General Assembly has the *sole exclusive right and power* to lay taxes, and that any attempt to vest that power elsewhere tends to destroy British as well as American freedom — goes further, and it is the one that was carried by a single vote and then expunged from the record the following day.

The Stamp Act crisis begins with a pleading in prescription, a citation of two Jacobean charters, and an invocation of the ancient constitution. Whatever else it is, it is not a revolutionary document. It is a very good brief.

The Declaratory Act, and the problem with no forum

Parliament repealed the Stamp Act on 18 March 1766 and, on the same day, passed the Declaratory Act.

> *That the said colonies and plantations in America have been, are, and of right ought to be, subordinate unto and dependent upon the imperial crown and parliament of Great Britain; and that the king's majesty, by and with the advice and consent of the lords spiritual and temporal, and commons of Great Britain, in parliament assembled, had, hath, and of right ought to have, full power and authority to make laws and statutes of sufficient force and validity to bind the colonies and people of America, subjects of the crown of Great Britain,* ***in all cases whatsoever.***

And further: that all resolutions, votes, orders and proceedings in the colonies whereby that authority is denied or drawn into question *are hereby declared to be utterly null and void to all intents and purposes whatsoever.*

Two things about that statute and both are findings.

The grammar. *Have been, are, and of right ought to be. Had, hath, and of right ought to have.* This collection has met that formula three times now — in Henry VIII's statutes proving that the supremacy always existed, in the Militia Act of 1661 reporting

that the command of the militia *is and by the Lawes of England ever was* the king's, and in the Bill of Rights declaring that their Majesties *did become, were, are and of right ought to be* king and queen. It is the insider's grammar, and its function is always the same: nothing is being created, a usurpation is merely being removed, and therefore nothing that rests on the old continuity is reopened.

And the anti-exception clause. *In all cases whatsoever.* The landscape of the 1688 study established the diagnostic: nobody drafts an absolute against a proposition nobody has thought of denying, and the elaboration of the absolute measures how recently and how successfully the denial has been made. Here it is at its purest, because the Declaratory Act was passed **on the same day as the repeal that conceded the Americans had won.** Parliament gave up the tax and asserted the power in the widest words the language contains, in one sitting. The width of the words is the measure of the retreat.

But the deeper problem is the one the Act exposes rather than creates, and it is this study's principal contribution to the framework.

The colonists had a case. It was a real case, in real law, on real authorities — charters under the great seal, a leading decision of 1608, prescription, the settlement limb of the conquest distinction, and the whole apparatus of the ancient constitution. Men trained in the Inns of Court made it, and men trained in the Inns of Court in London, including Camden and Burke and Chatham, agreed with a good deal of it.

And there was nowhere to bring it.

There was no court in the British empire with jurisdiction over the question *may Parliament tax the colonies?* The Privy Council heard appeals from colonial courts and could disallow colonial statutes; it could not entertain a challenge to an Act of the British Parliament, because no English court could. Parliament was sovereign, its sovereignty was the very thing in dispute, and it had just legislated its own answer to the question and declared all contrary proceedings null and void.

So the only available arbiter was one of the two parties, and that party had put its judgment in a statute.

Stated for the card: a legal argument in which one of the parties is also the sovereign legislature has no forum, and an argument with no forum terminates in force regardless of its merits. The companion study found that where a legislature is sovereign a protection has exactly one gap and the gap is the legislature — Fenwick's attainder in 1696 being the demonstration, when the Commons went round a statute it had passed months earlier. This is the same finding at imperial scale, and it explains something the political histories struggle with: why an argument so lawyerly, conducted for eleven years by men who kept petitioning, ended in a war. It was not

that the argument failed. It was that it could not be heard, and both sides eventually understood that.

1774, and the doctrine fully drawn

By 1774 the colonial position had hardened into the only shape the law left open, and it is Calvin's Case fully drawn.

If allegiance is personal to the king, and the colonies were settled by subjects carrying English law under charters from the crown, then the colonies are dominions **of the king** and not parts of the realm of England — and the Parliament of Great Britain, being the legislature of a different dominion, has no authority over them at all, except such as they consent to for the regulation of trade.

Jefferson's *Summary View of the Rights of British America* put it to the King directly, went behind the charters to a migration argument — that the Saxons had left the north of Europe and taken England, and their mother country had never claimed superiority over them — and told George III that *kings are the servants, not the proprietors of the people*. James Wilson and John Adams reached the same destination by tighter roads.

And the Declaration and Resolves of the First Continental Congress of 14 October 1774 claimed the colonists' rights on three grounds together: the immutable laws of nature, the principles of the English constitution, and the several charters or compacts.

Note the order and note the company. Nature is first in the list and last in the argument. The operative authorities are still the constitution and the charters.

Protection withdrawn

Then, in the last week of December 1775, Parliament did the one thing the common law of allegiance could not absorb.

The American Prohibitory Act, 16 Geo. III c. 5, prohibited all trade and commerce with the thirteen colonies, and provided that their ships and cargoes

> *shall become forfeited to his Majesty, as if the same were the ships and effects of open enemies, and shall be so adjudged, deemed, and taken in all courts of admiralty, and in all other courts whatsoever*

As if the same were the ships and effects of open enemies. The same formula as the Virginia charter — *to all intents and purposes as if* — the formula that makes two things legally identical, now used to make subjects into enemies.

John Adams understood immediately what had been done. He called it the Act of Independency, and said it made them independent, seven months before anybody declared it. Richard Henry Lee said the same. The Act reached America in February 1776; the open argument for independence began then.

The reason is not rhetorical and it is not emotional. It is *protectio trahit subjectionem, et subjectio protectionem.*

Allegiance is owed in return for protection. Parliament had declared the colonists' property forfeit as enemy property and ordered the navy to take it. The king had, in August 1775, proclaimed them in open rebellion. Protection was not merely withheld; it was formally withdrawn by statute, in the courts of admiralty and in all other courts whatsoever.

By the common law of England, as stated by Coke in 1608, the subjection went with it.

The Declaration read as an English legal instrument

Which brings us to 4 July 1776, and to the document that is universally read as the founding text of a new nation and is, in its operative parts, an English pleading.

Its structure is a bill of grievances against a king. The Parliament of Great Britain is never named in it. It appears once, obliquely, in the charge that *He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws* — which is the dominion theory in a single clause, and which required the omission of Parliament's name, because naming it would have conceded that it had a name in this constitution.

Its charges track the Declaration of Rights of 1689 to a remarkable degree. Set the two lists side by side.

England in 1689 charged James II with suspending laws and the execution of laws; with committing prelates for petitioning; with levying money without grant of Parliament; with raising and keeping a standing army in time of peace without consent of Parliament; with quartering soldiers contrary to law; with violating the freedom of elections; with prosecutions in the King's Bench cognisable only in Parliament; with partial, corrupt and unqualified jurors, and jurors in trials for high treason who were not freeholders; with excessive bail and excessive fines and illegal and cruel punishments; and with grants of fines and forfeitures before conviction.

America in 1776 charges George III with refusing his assent to laws; with dissolving representative houses repeatedly; with obstructing the administration of justice; with making judges dependent on his will alone for their tenure and their salaries; with keeping among us, in times of peace, standing armies without the consent of our

legislatures; with quartering large bodies of armed troops; with protecting them by a mock trial from punishment; with imposing taxes on us without our consent; with depriving us in many cases of the benefits of trial by jury; with transporting us beyond seas to be tried for pretended offences; and with taking away our charters, abolishing our most valuable laws, and altering fundamentally the forms of our governments.

Judicial tenure, standing armies, quartering, taxation without consent, juries, charters. Those are not new complaints and they were not framed as new. They are the 1689 list, updated, and several of them are complaints that a specific clause of the Bill of Rights or the Act of Settlement — instruments the colonists claimed as their own inheritance — was being denied to Englishmen in America.

Its procedure is an exhaustion of remedies. *In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury.* That is the pleading of a party establishing that no other course remained.

Its conclusion is the 1689 conclusion. *A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free people.* The Convention had put it that James, having endeavoured to subvert the constitution by breaking the original contract between king and people, had thereby forfeited the confidence of the nation.

And its operative charge is the word.

> *He has abdicated Government here, by declaring us out of his Protection and waging War against us.*

Abdicated.

The companion study of 1688 spent three weeks of parliamentary record on that word. The Lords wanted *deserted*; the Commons insisted on *abdicated*; Nottingham objected, correctly, that it was **not a word known to the common law of England**; and Somers answered him on his feet out of Grotius, Bartolus, Brissonius and Calvin's *Lexicon*, and the Commons carried it. The study concluded that the word was chosen precisely because it was empty — every English term dragged consequences the drafters could not accept, and *abdicated* arrived with none, so it could be given exactly the meaning required and no more. Its job was to effect a transfer without a transferor and without a forfeiture, by attributing the emptying to the loser's own act, in a sentence containing no other agent.

Eighty-seven years later, in Philadelphia, the same word is used to do precisely the same work. *He has abdicated Government here.* The king is the subject of the verb. Nobody deposes him; nobody conquers him; he has put the government down

himself. And what makes the sentence legally coherent — the reason it is a charge and not an insult — is the clause that follows: *by declaring us out of his Protection.*

That is Calvin's Case. Protection draws subjection; withdraw the protection and the subjection falls. The Prohibitory Act had declared their property forfeit as the property of open enemies, in all courts whatsoever, four months earlier. The Declaration is reciting the legal consequence.

So the operative legal argument of the Declaration of Independence is a 1608 English decision on the allegiance of Scotsmen, and its operative verb is the term an English Convention adopted in February 1689 because it had no meaning in English law. Two of the three most consequential moves in the document were made in Westminster, and the men who made the third were pleading them as their birthright.

What was not English about it, and who paid

Three things in the Declaration are not English law and the study would be dishonest to skate them.

The first is the preamble. *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights.* Nothing in Coke, the charters or the ancient constitution supplies that. It is a claim from nature, of the kind the University of Oxford had condemned as false, seditious and impious in 1683, and it is doing something no English argument could do — supplying a ground of right that does not descend from a grant, and therefore cannot be revoked by the grantor.

The colonists needed it precisely because their English case had run out of forum. An argument from charters ends at the party that issued them. An argument from nature ends nowhere, which is its weakness as law and its strength as a founding.

The second is the source of the new authority. *By the Authority of the good People of these Colonies.* The Convention of 1689 had refused, deliberately and at length, to say anything of the kind, because a crown granted by a people is an elective crown and the Lords fought a fortnight to keep the word *consent* out of the settlement. In Philadelphia it goes in as the enacting authority. That is the genuine break, and it is a single clause.

And the third is the distribution.

The men making an argument about the rights of Englishmen and their heirs held, in the southern colonies especially, a very large number of human beings as heritable property. Virginia, whose charter clause is the foundation of the whole case and whose

burgesses passed Henry's resolves, was a slave society; roughly a fifth of the population of the thirteen colonies was enslaved.

And English law, in these same years, was moving against them on that question. In June 1772, in *Somerset*, Lord Mansfield held that a slave brought to England could not be forcibly removed, on the ground that the state of slavery is of such a nature that it is incapable of being introduced on any reasons, moral or political, and that nothing can be suffered to support it but positive law. Whatever its precise ratio — and it has been argued over ever since — it was read on both sides of the Atlantic as English law declining to recognise slavery in the absence of a statute, and it was read in the plantation colonies with alarm.

Then, in November 1775, Lord Dunmore, the royal governor of Virginia, proclaimed freedom to the slaves of rebels who would come to the king's standard and bear arms.

That is *protectio trahit subjectionem* run in the other direction, and it was understood as such. The crown offered protection to people the colonists held as property, in exchange for their allegiance, and thousands came. It appears in the Declaration's list of grievances — *He has excited domestic insurrections amongst us* — sitting a few lines below the charge that the king had abdicated government by declaring the colonists out of his protection.

Jefferson's draft contained a long clause blaming the king for the slave trade itself; Congress struck it out.

The arithmetic is on the page and this study will not do the sum for the reader beyond stating it plainly. The doctrine of allegiance that furnished the colonists with their case was the same doctrine that furnished the crown with its answer, and the crown reached, in 1775, for the one constituency in America that the men pleading the rights of Englishmen had placed outside the category of Englishmen entirely.

Reading the argument against the framework

The principal contribution is the forum problem.

A legal argument in which one of the parties is also the sovereign legislature has no forum, and an argument with no forum terminates in force regardless of its merits. The colonists' case was good law: charters under the great seal declaring their status to all intents and purposes as if born in England, a leading decision of 1608 locating allegiance in the person of the king, the settlement limb of the conquest distinction, and a prescriptive right enjoyed uninterrupted and acknowledged for a century and a half. It was argued by trained lawyers, and substantial figures in Parliament agreed with it. And there was no tribunal in the empire that could hear it, because the only body

with jurisdiction over the authority of Parliament was Parliament, and it had legislated its own answer and declared all contrary proceedings null and void.

The companion study found the domestic version of this: where the legislature is sovereign, a protection has exactly one gap and the gap is the legislature. **This is the imperial version, and it yields a diagnostic. Where a study finds a long, technically sophisticated legal argument between a periphery and a metropole, it should ask first where the argument could have been decided. If the answer is nowhere, the outcome was determined before the pleadings began, and the quality of the pleadings tells you only how long the parties spent believing otherwise.**

Three findings compound.

A hierarchy that stops taxing itself finds someone without a vote to tax. On 16 January 1767 the British Commons reduced the land tax from four shillings to three by 204 to 188, blowing a half-million-pound hole in the revenue, and the ministry's response was a set of American duties expected to yield forty thousand. The study of 1688 identified the English landed class's willingness to tax itself as the variable separating a fiscal-military state from a partitioned one; this is what happens when the willingness lapses. **The recovered sum is characteristically trivial, because the transaction was never about the money — it was about which population could refuse.**

The anti-exception clause is the tell, and the Declaratory Act is its purest instance in the corpus. *In all cases whatsoever*, passed on the same day as the repeal that conceded the point. The width of an absolute measures the recency of the denial it is drafted against, and here the denial and the absolute are in the same afternoon's business.

And the abdication fiction travels. The seventh settlement fiction, named in the 1688 study — transfer without a transferor and without a forfeiture, effected by attributing the emptying to the loser's own act in a sentence with no other agent — reappears in 1776 doing the identical job, in a document that also imports the reciprocity of Calvin's Case to make the attribution stick. **A fiction that solves a structural problem will be reached for again by anyone who meets the same problem, and its second users need not know its history to select it correctly.** The men in Philadelphia knew the 1689 precedent very well indeed; the point is that they would have arrived at the same word without it, because the position permits nothing else.

A closing observation about what this case says of the framework's account of change.

The companion study of the Dominion of New England found a colonial hierarchy that endured three years of abolished assemblies, imposed taxes and reopened land titles, did nothing, and then moved within a fortnight of learning that the metropolitan floor had fractured. The variable was never the grievance; it was whether defection had become survivable.

In 1776 the metropolitan floor had **not** fractured. There was no Torbay, no defecting officer corps, no vacant throne. The British state was solvent, its army intact and its navy the largest in the world. So this hierarchy had to do what the Bostonians of 1689 did not: build a floor of its own, from committees of correspondence, provincial congresses, a Continental Association and finally an army — and then find a foreign power to supply what it could not, which is what the alliance of 1778 was.

It took them eleven years and a Prohibitory Act to get there, and for most of those eleven years they were not trying to build anything. They were trying to win a lawsuit.

A note on sources. Quoted exactly from public-domain primary texts: the First Charter of Virginia of 10 April 1606, at "all and everie the parsons being our subjects" through "as if they had been abiding and borne within this our realme of Englande or anie other of our saide dominions", from the text at the Avalon Project, with orthography as there given and modernised spellings noted where secondary reproductions differ; the Virginia Resolves of 30 May 1765, at the first resolve on the first adventurers and settlers, the second on the two royal charters, the third on taxation and the ancient constitution, and the fourth at "has never been forfeited or yielded up, but has been constantly recognized by the kings and people of Great Britain", from Henry's manuscript as transcribed by Encyclopedia Virginia and from the parallel texts at Teaching American History and Colonial Williamsburg, which differ in spelling and lightly in wording; Calvin's Case (1608), 7 Co. Rep. 1a, 77 E.R. 377, at "it is truly said that protectio trahit subjectionem, et subjectio protectionem", from the English Reports text; the Declaratory Act 1766 (6 Geo. 3 c. 12), at the preamble and at "had, hath, and of right ought to have, full power and authority ... in all cases whatsoever" and the nullity clause; the American Prohibitory Act (16 Geo. 3 c. 5), at "shall become forfeited to his Majesty, as if the same were the ships and effects of open enemies, and shall be so adjudged, deemed, and taken in all courts of admiralty, and in all other courts whatsoever"; the Townshend Revenue Act 1767 at its revenue preamble; the Declaration of Independence, at the charges enumerated, at "He has combined with others to subject us to a jurisdiction foreign to our constitution", at "He has abdicated Government here, by declaring us out of his Protection and waging War against us", at "In every stage of these Oppressions We have Petitioned for Redress", at "A Prince, whose character is thus marked by every act which may define a Tyrant", and at the

Quebec Act grievance; and Lord Mansfield in *Somerset v Stewart* (1772), at "so odious, that nothing can be suffered to support it, but positive law", which is quoted here from the standard report and whose surrounding words are given in this study's own paraphrase. The Declaration of Rights 1689 is quoted in the companion study and its grievance list is here summarised rather than reproduced.

Paraphrased and credited to modern scholarship or drawn from the standard reference literature: the growth of the British national debt across the Seven Years' War; the division of 16 January 1767 reducing the land tax from four shillings to three by 204 to 188, the resulting deficiency of about half a million, and Townshend's subsequent American measures — this account follows the standard biographical narrative of Townshend and should be checked against the Commons journals; the estimated yield of the Townshend duties at about £40,000; the Royal Proclamation of 1763 and its effect on western land claims, including those of the Ohio and Loyal Companies and of George Washington; the Quebec Act 1774; the dominion theory as developed by Jefferson in the *Summary View*, by James Wilson and by John Adams in *Novanglus*; the Declaration and Resolves of the First Continental Congress of 14 October 1774; the reception of the Prohibitory Act in America in February 1776 and John Adams's and Richard Henry Lee's reactions; Dunmore's Proclamation of November 1775; and the striking of Jefferson's slave-trade clause by Congress.

Contested and uncertain points are flagged. **The reading of the Declaration of Independence as a document whose operative legal machinery is English is this study's argument, not a recovered intention**, and it should be weighed as an argument; the scholarship on the Declaration's sources is enormous and divided, with strong cases made for Scottish moral philosophy, for Locke, for the Continental natural-law tradition and for the colonial charters and English constitutional precedent, and this study has emphasised the last without disposing of the others. The fifth Virginia Resolve's passage by one vote and its expunging the following day is the standard account; the number of resolves passed is given variously as four or five and two further resolves circulated in the press were never before the House, which is a well-known muddle and is not resolved here. Henry's reported "Caesar had his Brutus" speech and the cry of "Treason" rest on later recollections and on a single anonymous French traveller's journal, and are deliberately not quoted. The precise ratio of *Somerset* is genuinely disputed and this study asserts only how it was read at the time. The figure of roughly a fifth of the colonial population being enslaved is an approximation from the 1770 estimates and varies sharply by colony. The characterisation of the Proclamation of 1763 as principally a threat to elite land speculation is one strand of a contested historiography; other accounts weight frontier security, Indian policy and

imperial economy more heavily, and the two readings are not exclusive. Finally, the argument that the colonists' case was good law is a judgment; the ministerial case for parliamentary sovereignty over the whole empire was also a serious legal position, held by serious lawyers, and this study's point is not that one side was right but that no tribunal existed to say so. Every load-bearing fact in this study is to be re-verified against a primary or standard source before it is built upon.